D.T.E. 98-48-Phase I

Petition of Fitchburg Gas and Electric Light Company for approval by the Department of Telecommunications and Energy of its Low-Income Gas Conservation/Education Program.

D.T.E. 98-49 Phase I

Petition of Fitchburg Gas and Electric Light Company for approval by the Department of Telecommunications and Energy of its Five-Year Energy Efficiency Plan, including its Low-Income Electric Conservation/Education Program, covering the period 1998-2003.

ORDER ON MOTION FOR RECONSIDERATION

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I. INTRODUCTION

On May 1, 1998, Fitchburg Gas and Electric Light Company ("Fitchburg" or "Company") filed with the Department of Telecommunications and Energy ("Department") its Five-Year Energy and Efficiency Plan ("Energy Efficiency Plan" or "Plan") for electric service covering the period 1998-2002. The Department docketed the filing as

D.T.E. 98-48/49. Subsequent to the filing, the Attorney General of the Commonwealth ("Attorney General") and the Division of Energy Resources ("DOER") submitted comments objecting to the provision in Fitchburg's Plan that called for the continued recovery of lost-base revenue ("LBR") associated with the implementation of the Company's Energy Efficiency Plan for electric service. On November 6, 1998, the Department granted a motion by the intervenors[(1)] to consider the appropriateness of LBR and to defer proceedings with respect to the non-LBR issues (Tr. 2, at 5-6).

On November 5, 1999, the Department issued D.T.E. 98-48/49 Phase I ("Order"). In the Order, the Department rejected Fitchburg's continued recovery of LBR. The Department noted that because the Electric Industry Restructuring Act ("Restructuring Act"), St. 1997,

c. 164, mandated the collection of money earmarked to fund cost-effective cost energy efficiency programs, LBR is "no longer necessary" to induce a distribution company to voluntarily undertake such programs. Order at 8. The Department found that Fitchburg was not entitled to recover LBR after March 1, 1998, and directed Fitchburg to credit to its Energy Efficiency Program all money collected since March 1, 1998 for LBR recovery with interest at the Company's weighted cost of capital from the Company's most recent rate case. Id. at 7-8.

On November 24, 1999, Fitchburg timely filed a Motion for Reconsideration ("Motion"); on January 10, 2000, DOER submitted its Memorandum in Opposition to the Motion for Reconsideration ("Memorandum"); and on January 11, 2000, the Attorney General filed its Objection to the Company's Motion for Reconsideration ("Objection").

II. STANDARD OF REVIEW

The Department's Procedural Rule, 220 C.M.R. § 1.11(10), authorizes a party to file a motion for reconsideration within twenty days of service of a final Department Order. The Department's policy on reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth

Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A

at 5 (1983).

III. POSITION OF THE PARTIES

A. Fitchburg

Fitchburg claims that the Department, by disallowing LBR recovery on demand-side management ("DSM") measures[(2)] installed before the retail access date, March 1, 1998, through mistake or inadvertence, issued an Order that violates established principles of law (Motion at 2). Fitchburg makes five claims in support of its Motion.

First, Fitchburg claims that the Department based its decision on a mistaken interpretation that LBR recovery was used to induce Fitchburg to voluntarily conduct energy efficiency programs (Motion at 5). Fitchburg asserts, however, that its participation in energy efficiency programs was not voluntary (id. at 5-7). Fitchburg notes that the Department ordered it to implement a pilot program after finding that it had not adequately considered energy efficiency strategies (id., citing Fitchburg Gas and Electric Light Company, D.P.U. 84-145-A at 173 (1985)). In 1991, the Department ordered Fitchburg to submit energy efficiency program designs and cost-effectiveness analyses for six programs[(3)] after finding that Fitchburg's proposal was not comprehensive enough (Motion at 5-7, citing Fitchburg Gas and Electric Light Company, D.P.U. 89-179, at 7 (1991)). Fitchburg contends that LBR recovery was not developed to induce a company to conduct energy efficiency programs voluntarily, but rather to compensate it for "sales erosion that adversely affects revenues in a significant, quantifiable way" (Motion at 5-7, citing Western Massachusetts Electric Company, D.P.U. 89-260, at 104 (1990)).

Second, Fitchburg claims that Department misinterpreted the Legislature's silence on LBR in the Restructuring Act (id. at 9-11). Specifically, Fitchburg asserts that the

Legislature's silence on LBR in the Restructuring Act is evidence that it did not intend to prohibit LBR recovery (id. at 9-11). Further, Fitchburg argues that, merely because energy efficiency programs are now mandated by statute rather than by the Department's orders, no legal or policy basis exists to revoke LBR recovery (id. at 10).

Third, Fitchburg claims that the Department's Order violates the policy of reasoned consistency because it does not distinguish between DSM measures that were previously installed, for which the Department approved LBR recovery, and DSM measures that would be installed in the future (id. at 12). Fitchburg argues that, although the Department has the authority to change its LBR recovery policy on a prospective basis, reasoned consistency precludes the Department from doing so for measures previously installed and approved by the Department (id. at 12-13).

Fourth, Fitchburg claims that revoking its LBR recovery is unconstitutional (id.

at 14-15). Fitchburg contends that the Department may have entered into a contractual agreement with the Company because it encouraged Fitchburg to implement DSM programs and that subsequent reversal of LBR recovery could constitute a breach of that contract (id.). In support of its claim, Fitchburg cites United States v. Winstar, 518 U.S. 839 (1996).[(4)] According to Fitchburg, Winstar holds that a governmental agency can be contractually obligated to a private party and thus be prohibited from subsequently abrogating its contracts pursuant to a change in legislation or policy (Motion at 14, citing Winstar, 518 U.S. 839,

869- 870). Moreover, in arguing that there is a contractual relationship, Fitchburg contends that the Department's Order violates the Contract Clause of the United States Constitution (Motion at 14-15).[(5)] Fitchburg states that the Department approved its DSM programs and associated LBR recovery and that retroactively revoking these LBR revenues violates the Contract Clause (id.).

Fifth, Fitchburg claims that (1) by requiring Fitchburg to refund to its customers LBR collected since March 1, 1998, and (2) applying the revised LBR recovery policy to measures installed before March 1, 1998, the Department is retroactively changing Fitchburg's rates without giving it an opportunity to respond and take appropriate action (id. at 3-4, 13). Finally, Fitchburg claims that the cost of capital from its last rate case is the wrong rate to apply to LBR refunds (id. at 18-19). Fitchburg states that the prime rate has been the rate applied to past under- and over-recoveries for its DSM programs (id. at 18).

B. DOER and the Attorney General

DOER and the Attorney General recommend that the Department reject Fitchburg's Motion. They claim that there are no new facts or extraordinary circumstances that require a fresh look at the record and that the Department's decision was not the result of mistake or inadvertence (DOER Memorandum at 4-5; Attorney General Objection at 3-4). DOER notes that other utilities relinquished LBR recovery and asserts that Fitchburg had time to revise its DSM practices after the Restructuring Act's passage, when it should have known that LBR would be eliminated as a consequence (DOER Memorandum at 8). DOER and the Attorney General address (1) the reasons for LBR recovery; (2) retroactive ratemaking; and (3) contract abrogation issues.

First, DOER and the Attorney General argue that before passage of the Restructuring Act, the Department provided for pre-approval of efficiency program expenditures, LBR recovery, and shareholder incentives (DOER Memorandum at 6-7; Attorney General Objection at 3). They argue that the Department used these mechanisms to put supply-side and demand-side resources on equal footing and to induce utilities to voluntarily implement high-quality DSM programs (id.). DOER notes that without these mechanisms, DSM resources were at a rate-making disadvantage as compared with supply-side resources because the utilities could not earn a return on C&LM expenditures (DOER Memorandum at 6). DOER asserts LBR became unnecessary immediately upon passage of the Restructuring Act (id. at 7). DOER adds that even if Fitchburg did not voluntarily engage in DSM before the Restructuring Act, it cannot claim to be financially impaired because the Company will earn a return on equity in excess of 20 percent without LBR, compared to the 16.3 percent rate allowed in its most recent rate case (1983), and the eleven percent figure that DOER contends is now appropriate (id., citing Exh. DOER-3, at 26-27; Tr. 3, at 260, 267-268, 275, 283, 286; Order at 5).

Second, DOER and the Attorney General claim that the Department's decision does not constitute retroactive ratemaking (DOER Memorandum at 9; Attorney General Objection at 4-5, 6). DOER argues that the cases cited by Fitchburg[(6)] are inapplicable (DOER Memorandum at 9). DOER notes that in those cases, the Department attempted to retroactively reverse some of its own rulings, absent a statutory mandate by the General Court (id.). DOER contends that, in this case, the Department is responding to the legislative mandate of the Restructuring Act (id.). The Attorney General maintains that the Order did not retroactively change Fitchburg's rates and that its effect was to reconcile DSM revenue accounting with the requirements of the Restructuring Act (Attorney General Objection at 4-6). In particular, the Attorney General notes that the Department "was clear from the outset that the terms of the Company's proposed restructuring plan and the new charges included therein were approved 'subject to further review and reconciliation'"

(id. at 5, citing Fitchburg Gas and Electric Light Company, D.T.E. 97-115, at 13 (1998).

Third, DOER and the Attorney General maintain that the Department's Order does not violate constitutional law, including the Contract Clause (DOER Memorandum at 10-11; Attorney General Objection at 5-6). They assert that the five constitutional law cases cited by Fitchburg are factually dissimilar. Moreover, they argue that there is no contractual relationship between Fitchburg, a regulated utility, and the Department (DOER Memorandum at 10-11; Attorney General Objection at 5-6). The Attorney General states that the Department's past actions do not contractually obligate it because there is no evidence of legislative intent to create private contractual rights enforceable against the State (Attorney General Objection at 5-6).

Last, DOER contends that it is within the Department's discretion to choose one interest rate over another with regard to LBR refunds (DOER Memorandum at 11-12).

IV. ANALYSIS AND FINDINGS

As stated above, the Department's standard of review for reconsideration allows us to reconsider a previously-decided issue only when (1) the petitioner brings to light previously unknown or undisclosed facts which would have a significant effect upon the decision already rendered; or (2) the Department's treatment of the issue was arguably the result of mistake or inadvertence. Fitchburg presented five arguments in support of its Motion. The Department assesses these arguments against its criteria for reconsideration.

First, Fitchburg argues that the Department misinterpreted the Restructuring Act because the Restructuring Act does not address the issue of LBR recovery, expressly so called. The Restructuring Act does, however, address ratepayer-funded energy efficiency activities (i.e., the genus of which C&LM and DSM -- and associated LBR -- are but species) in a comprehensive manner. The Restructuring Act authorizes (1) DOER to oversee and coordinate these activities pursuant to several identified goals, and (2) the Department to review and approve energy efficiency expenditures after determining that implementation of such programs was cost-effective. G.L. c. 25, § 19; G.L. c. 25(A), § 11(G). The Restructuring Act's failure to use the particular term "LBR recovery" does not absolve the two agencies from applying express legislative direction to a question formerly resolved through implied ratemaking authority and from determining whether continued LBR recovery is appropriate in the restructured electric industry, given the goals established by the Restructuring Act. The General Court clearly stated how energy conservation programs were to be funded; and, in our view of the law, it did not intend that ratepayers should pay both the energy conservation charge and the now redundant LBR incentive for conservation. The Department, in D.T.E. 98-48/49 Phase I, and DOER, in its comments, concluded that post the 1997 Restructuring Act, continued recovery of LBR was no longer appropriate. The Department concludes, moreover, that Fitchburg's argument on this matter does not meet the criteria for reconsideration because it has not presented any previously unknown or undisclosed facts that would have a significant impact on the decision already rendered.

Second, Fitchburg argues that, because our decision in D.T.E. 98-48/49 Phase I does not distinguish between DSM measures previously installed, for which the Department approved LBR recovery, and DSM measures that will be installed in the future, the decision violates the policy of reasoned consistency. The Department disagrees. This same issue was raised, four years earlier, in Western Massachusetts Electric Company, D.P.U. 95-8-CC Phase II (1995), in which Western Massachusetts Electric Company ("WMECo") argued that the Department may apply a revised LBR recovery policy prospectively to DSM measures installed during 1996 and beyond, but lacks the authority to apply the revised policy retrospectively to measures installed before 1996. Id. at 41-42. The Department rejected WMECo's arguments and implemented the rolling period method for calendar year 1996, to be applied to all installed measures consistent with the rolling period method. Id. at 50-52. Reasoned consistency with that 1995 Order characterizes the Department's approach in the instant proceeding: our revised policy in D.T.E. 98-48/49 Phase I took effect on the effective date of industry restructuring and applied to all installed measures. Not only was there reasoned consistency but there was also ample notice of the principle at issue.

In exercising our discretion to revise our LBR policy, the Department is mindful of the dictates expressed in Boston Gas Company v. Department of Public Utilities, 367 Mass. 92, 104 (1975), wherein the Supreme Judicial Court ("SJC") stated:

A party to a proceeding before a regulatory agency such as the Department has a right to expect and obtain reasoned consistency in the agency's decisions. This does not mean that every decision of the Department in a particular proceeding becomes irreversible in the manner of judicial decisions constituting res judicata, but neither does it mean that the same issue arising as to the same party is subject to decision according to the whim or caprice of the Department every time presented.

Consistent with the Boston Gas Company decision, the Department notes that a significant or material change in circumstances may warrant a departure from a previous ruling or determination. For example, in Boston Edison Company v. Department of Public Utilities, 419 Mass. 738, 747-748 (1995) the SJC held that, where a change of circumstance is "extraordinary," it may be appropriate for the Department to reconsider an earlier decision. A recent application of this principle can be found in our decision in Petition of MCI WorldCom Corporation, D.T.E. 98-85, at 13 (1998), where the Department determined that Bell Atlantic must implement intraLATA presubscription by April 20, 1999, rather than upon entry into the interLATA market, as previously ordered by the Department in NYNEX, D.P.U./D.T.E. 96-106 (1997). In doing so, the Department stated that it "would be unfair to Massachusetts consumers if the Department failed to reassess the timing question given the significant change in circumstances." Id.

The Department's revised LBR recovery policy in D.T.E. 98-48/49 Phase I was adumbrated in D.P.U. 95-8-CC Phase II and responded to the significant changes that have taken place in the electric industry. The Department's initial LBR policy allowed companies to recover LBR until their subsequent rate case. See Western Massachusetts Electric Company, D.P.U. 89-260, at 104-105 (1990). In Eastern Edison Company, D.P.U. 94-4-CC (1994), we refined our policy so that companies could recover LBR for a particular year's DSM implementation only for a specified number of years, based on the average time period between a company's four most recent rate cases (known as the "rolling period method").[(7)] One of the reasons for moving to the rolling period method was that "the impending restructuring of the electric utility industry has provided a profound incentive to electric utilities to maintain stable rates and reduce the frequency of rate case filing." Id. at 43. On March 1, 1998, the restructuring of the electric industry took effect, pursuant to the Restructuring Act. This watershed event certainly warranted the Department reevaluating existing LBR policies to determine whether these policies would remain consistent with the impending change in industry structure. Therefore, the Department concludes that Fitchburg's argument regarding reasoned consistency does not meet the criteria for reconsideration.

Third, Fitchburg argues that the Department's revised LBR policy may violate its contractual right to LBR recovery. Fitchburg states that the "Department's act of encouraging [sic] [it] to implement DSM programs assuming LBR recovery could [sic] constitute a contractual agreement" (Motion at 14). In support of its argument, Fitchburg cites United States v. Winstar, 518 U.S. 839, for the proposition that the state and federal government may enter into a binding contract with a regulated industry (Motion at 4).[(8)] In its Motion, Fitchburg argues that Winstar may apply to the facts of this case and restates its holding, but the Company does not point to any specific examples or provide any insight into why it thinks that Winstar applies (id.). Fitchburg also argues that there "could" be a contractual agreement, and states that the Department's Order violates the Contract Clause of the United States Constitution (id. at 14-17). The Department finds that the present proceeding has little, perhaps nothing, in common with the facts and holding of Winstar. In Winstar, a federal agency entered into express contracts with three private parties. Winstar, 518 U.S. 839, 860-871. Here, the Department clearly never entered into an express or even an implied contract with Fitchburg that provided for the indefinite collection of LBR. It established a voluntary, regulatory incentive to reward certain actions on the Company's part, but only for as long as it was economically rational and statutorily compatible to do so. To call that a contract is to offer a makeweight argument for a motion that falls short of the measure. Although the Department allowed LBR recovery, with the passage of the Restructuring Act, the Department determined that continued LBR recovery was inconsistent with the new legislation. The Department finds that Fitchburg's expectation of LBR recovery, based upon past Department approval, by no means establishes a contractual obligation on the part of the state. As is clear from the cases cited by Fitchburg, there must be a legislative intent to create "private rights of a contractual nature enforceable against the state." United States Trust Company v. New Jersey, 431 U.S. 1, 17, n. 14 (1997) (contract between two states and a private party). Therefore, because the Department has not established a contractual relationship, the Department concludes that Fitchburg's argument on this point does not meet the criteria for reconsideration.

Fourth, Fitchburg argues that our decision in Phase I amounted to retroactive ratemaking. The Company is incorrect on this issue. The sole effect of the Department's decision was to decide the manner in which Fitchburg's energy efficiency budget would be allocated between program-related costs and non-program-related costs. The Company's rates have not been affected by our decision. Therefore, the Department concludes that Fitchburg's argument on this matter does not meet the criteria for reconsideration.

Fifth, Fitchburg argues that the Department based its decision on a mistaken interpretation that LBR recovery was used to induce Fitchburg to voluntarily implement DSM programs. Fitchburg, and other electric companies, were under Department order to pursue energy efficiency activities to the extent that such activities were more cost-effective than available generation supply resource options. See D.P.U. 86-36-F at 18-19, 29, 33 (1988); 220 C.M.R. §§ 10.02, 10.03(5)(a)6, 10.03(7)(b). Therefore, the Department concludes that our reliance on Fitchburg's voluntary participation in DSM programs was the result of mistake or inadvertence and grants the Company its Motion for Reconsideration on this issue.

In determining whether Fitchburg should be allowed LBR recovery, the Department first addresses whether the underlying rationale for LBR recovery still exists in a restructured electric industry. LBR recovery was introduced in the context of vertically-integrated electric companies providing fully-bundled (i.e., generation, transmission, and distribution services) to their customers. The Department recognized that, absent a change in the ratemaking treatment applied to investments in DSM, it would be in the financial interest of companies to pursue generation supply resources over energy efficiency resources to meet the load requirements of their customers.[(9)] D.P.U. 86-36-F at 32-36. Three issues were identified: (1) return on DSM investment, (2) performance incentives, and (3) LBR recovery. Id. The criterion for allowing recovery of LBR was that a company must demonstrate that the implementation of its energy efficiency programs resulted in erosion of sales that adversely affected its revenues in a significant, quantifiable way. D.P.U. 89-260, at 104. With the passage of the Restructuring Act and the development of a competitive generation market, electric companies no longer invest in generation supply resources to meet the load requirements of all of their customers. As such, energy efficiency resources no longer compete with generation resources for companies' investment dollars. Instead, electric companies are required by law to invest a certain amount of dollars in energy efficiency activities. Thus, a fundamental basis for LBR recovery, the need to "level the playing field" between supply-side and the demand-side resources, has been removed by the restructuring of the electric industry.[(10)] The goal of the LBR policy having been eliminated, the incentives to effect the policy no longer have a raison d'être. The Department therefore addresses whether Fitchburg meets the criterion for recovery of LBR, i.e., that the implementation of its energy efficiency programs resulted in erosion of sales that adversely affect its revenues in a significant, quantifiable way. D.P.U. 89-260, at 104.

The Department concludes that Fitchburg does not meet this criterion. Under the current ratemaking treatment for electric distribution companies in the restructured industry, LBR applies only to distribution services, whereas, previously, LBR applied to generation, transmission, and distribution services. Generation and transmission costs are no longer included in base rates, and the rates intended to recover these costs are no longer set in rate case proceedings based on test-year cost data. Instead, these rates are set annually based on actual costs and are fully reconcilable. Although a reduction in sales due to the implementation of energy efficiency programs may diminish a company's revenues associated with providing distribution service, nonetheless distribution companies provide generation service to ratepayers as a procured service, and so implementation of energy efficiency programs would not necessarily reduce the company's earnings. In D.P.U. 94-4-CC at 41, the Department emphasized that net revenue reduction (i.e., the reduction in a company's revenue minus the reduction in its costs) represents an accurate determination of the effect of energy efficiency programs on a company's net revenue. Therefore, under current ratemaking practices, the effect of Fitchburg's energy efficiency programs on its net revenue has dropped away dramatically. Accordingly, whether the Company's participation was voluntary or required, the Department's original decision in D.T.E. 98-48/49 Phase I would remain unchanged. Upon reconsideration, the Department's Order is affirmed.

With regard to the interest rate on the refund of LBR recovery after March 1, 1998, as Fitchburg notes, the Department has in the past used the prime rate for under- and over-recoveries from Fitchburg's energy efficiency programs. However, as DOER notes, it is within the Department's discretion to choose one interest rate over another with regard to LBR refunds. Fitchburg has not shown that our decision on LBR recovery was a result of mistake or inadvertence. Therefore, the Department concludes that Fitchburg's argument with respect to the interest rate to be applied to LBR refunds does not meet the criteria for reconsideration.

VI. ORDER

Accordingly, after due consideration, the Department of Telecommunications and Energy affirms its Order in D.T.E. 98-48/49 Phase I.

By Order of the Department,

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James Connelly, Chairman

____

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

1. The Attorney General, DOER, the Northeast Energy Efficiency Council, and the National Consumer Law Center.

2. What the Restructuring Act calls energy efficiency programs were formerly known as Conservation and Load Management ("C&LM") programs in the 1980s and as DSM programs in the 1990s. The parties and the Department use these terms interchangeably.

3. The programs included: (1) electric space heat program; (2) multifamily retrofit program; (3) "neighborhood blitz" program; (4) lighting catalogue/rebate program;

(5) Energy Crafted Home program; and (6) electric water heater rebate program. Fitchburg Gas & Electric Light Company, D.P.U. 89-179, at 7 (1991).

4. Fitchburg states the United States Supreme Court found that although the federal government could change its regulations in the thrift industry, the federal government assumed the risk that new legislation would prevent it from performing its contractual obligations (id., citing Winstar, 518 U.S. 839, 870). According to Fitchburg, the Supreme Court held that the federal government's contracts required the government to pay damages to the private thrift institutions when its performance was prevented by regulatory change (id.).

5. To support its Contract Clause argument, Fitchburg cites the following cases: Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 416 (1983); United States Trust Co. v. New Jersey, 431 U.S. 1, 21 (1997); Mercado-Boneta v. Administracion del Fondo de Compensacion al Paciente, 125 F.3d 9, 12 (1st Cir. 1997); and Parker v. Wakelin, 123 F.3d 1, 5 (1997).

6. Fryer v. Department of Public Utilities, 374 Mass. 685 (1978); Boston Gas Company v. Department of Public Utilities, 367 Mass. 92 (1975); City of Newton v. Department of Public Utilities, 367 Mass. 667 (1975).

7. In D.T.E. 98-48/49 Phase I, the Department mistakenly referred to Western Massachusetts Electric Company, D.P.U. 95-8-CC Phase II (1995) as the Order in which this LBR recovery method was first implemented.

8. In Winstar, a federal agency entered into a contractual agreement with three healthy thrifts to acquire ailing thrifts with the promise that the healthy thrifts could include goodwill towards their capital reserve requirements. Winstar, 518 U.S. 839, 860-871. The United States Supreme Court found for the thrifts, holding that the "Government breached these contracts when, pursuant to the new regulatory capital requirements ... the federal regulatory agencies limited the use of supervisory goodwill and capital credits in calculating respondents' net worth." Id. at 870.

9. This is because energy efficiency programs result in lower energy use than in the test year of a company's most recent rate case, causing a company to sell less electricity and collect less revenue than was assumed in establishing rates. See D.P.U. 86-36-G (1989); 220 C.M.R. § 10.02 (29). The mechanism of LBR recovery was designed to restore the assumed relationship between sales levels and revenue requirements that historically has been used in setting rates. D.P.U. 89-260, at 105.

10. The Department notes that electric companies still are provided the opportunity to earn performance incentives if they demonstrate that they are implementing their energy efficiency programs well.